

U.S. Department of Justice

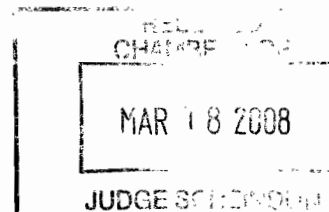
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March 17, 2008

BY HAND DELIVERY

The Honorable Shira A. Scheindlin
United States District Judge
United States Courthouse
500 Pearl St., Room 640
New York, NY 10007



Re: *Bowers v. Dep't of Veteran Affairs, et al.*, 08 Civ. 1309 (SAS)

Dear Judge Scheindlin:

This Office represents the defendants (the "VA" or "Government") in the above-referenced action. I write on behalf of plaintiff's counsel as well as the Government to provide Your Honor with an update on the status of the parties' efforts at seeking to resolve this matter in advance of the conference scheduled for 4 p.m. on March 19, 2008.¹ As described more fully below, although having worked diligently to seek a resolution, the parties are not confident that, by March 19, they can provide a definitive statement as to whether an agreement in principle has been reached or further litigation will be necessary. Accordingly, the parties respectfully request that the upcoming conference be adjourned to a date during the week of April 14, 2008 that is convenient for the Court. If the request is granted, the parties expect to be able to report more definitively on the status of this litigation.

By way of background, plaintiff's counsel, Mental Hygiene Legal Services ("MHLS"), commenced this action on February 8, 2008 and sought a temporary restraining order ("TRO") to enjoin the VA from medicating plaintiff with Zyprexa, a psychotropic medication, over his objection. After Your Honor denied the request for a TRO and prior to the hearing on plaintiff's request for a preliminary injunction, the parties agreed that the VA would cease administering Zyprexa until a new committee of VA medical staff could meet to

¹ At the February 21, 2008 conference, Your Honor also instructed the Government to examine the issue of whether subject matter jurisdiction over plaintiff's claims exists.

As to plaintiff's purported facial challenge to the VA regulation at issue in this case, 38 C.F.R. § 17.32(g)(2), Congress clearly has vested jurisdiction to consider that claim in the Court of Appeals for the Federal Circuit, instead of this Court. See 38 U.S.C. § 502 (judicial review of VA regulations "may be sought only in the United States Court of Appeals for the Federal Circuit"); see also *Preminger v. Principi*, 422 F.3d 815, 821 (9th Cir. 2005); *Hall v. Dep't Veterans' Affairs*, 85 F.3d 532, 534 (11th Cir. 1996) (*per curiam*).

Request granted
April 15 at 3:30 p.m.
Conference adjourned to
So Ordered: JUDGE SCHEINDLIN 3/18/08

evaluate the appropriateness of medicating plaintiff with Zyprexa over his objection, with plaintiff having an opportunity to present his view through counsel. At the February 21, 2008 conference with the Court that followed, the parties informed Your Honor of ongoing discussions toward resolving this matter without further litigation. Your Honor instructed the parties to continue such discussions and ordered that a conference be held on March 19, 2008 to determine whether litigation should proceed.

Since the February 21st conference, counsel for the parties have conferred on four occasions to identify the issues with the greatest practical impact. At the same time, there also have been numerous internal discussions within the VA and MHLS regarding how best to safeguard the interests of involuntarily committed veterans who are given psychotropic medication over their objections. Based on those discussions, the VA and MHLS have identified the most relevant VA policies and procedures. Once MHLS receives the information on those policies and procedures, which the VA expects to provide sometime this week, the parties will be able to determine whether to resolve this matter or whether further litigation is merited. Accordingly, the Government respectfully requests a brief adjournment of the upcoming status conference to enable the parties to determine their position.

On behalf of the VA and counsel for the plaintiff, I thank the Court for its consideration of the parties' request.

Respectfully,

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United States Attorney
Counsel for the Defendants

By: _____

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